National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 4, 1996

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Chas. H. Lilly Co., Cases 36-CA-7685; 7708

133-9000, 530-6033-4240, 530-8036-2000

This Section 8(a)(5) case was submitted for advice as to whether the Employer's refusal to meet with the designated Union representative was privileged because that individual's conduct during grievance meetings constituted sexual harassment under Title VII.

In about February 1995, the steward for Chemical Workers Local 109 (the Union) asked International representative Clarence Gipson to become involved in grievance matters. Disagreements between Gipson and Employer official Dianne Burt-Green surfaced immediately. During a spring meeting, Gipson referred to Burt-Green as "Madam" or "Ma'am," to which she objected because she considered the term offensive. Conflicts between the two individuals continued sporadically through the summer, although there were periods during which they apparently subsided. When Burt-Green was absent from late August until mid-October, Employer official Vaughn Myers handled labor relations and had fewer conflicts with Gipson. There is evidence that Myers was more diligent at providing the Union with information and was more responsive to discussing and resolving matters than Burt-Green.

Gipson and Myers agreed to proceed with a scheduled October 11 grievance meeting only if the Union steward wanted to proceed without Gipson, who could not attend. Myers persuaded the steward to proceed with the meeting, which ended with an understanding that Burt-Green would contact the steward the next day to arrange a date for the next meeting. However, on October 12, Burt-Green insisted on holding the meeting that day despite extensive objections from the steward and Union president to proceeding without Gipson.

At the next scheduled grievance meeting on October 27, Burt-Green wanted to discuss only the grievances she had placed on the agenda, while Gipson wanted only to discuss why Burt-Green had insisted on the October 12 meeting over the steward's objections. Each individual claims being called a "liar" by the other. When they finally began discussing a grievance, Burt-Green's responses to Gipson's information requests were not clear or straightforward. The discussion became more heated, Gipson addressed Burt-Green as "Madam" or "Ma'am," and she terminated the meeting. On October 30, Myers informed Gipson that since his October 27 conduct was abusive, offensive and sexually harassing, the Employer would neither meet with him nor allow him on the premises, and has since refused to discuss a resolution.

The Region, after reviewing the minutes of grievance meetings submitted by the Employer, has determined there is insufficient evidence demonstrating that Gipson's presence has made grievance resolution impossible or futile.[1] Thus, unless Gipson's conduct constitutes unlawful sexual harassment, it is clear that the Employer was not relieved of its duty to meet with him.[2] Further, we would argue that language Union representatives may use in the context of bargaining or grievance adjustment cannot be more restricted than that employees may use in similar situations. In this regard, the Board has long held that a statement made when discussing working conditions is protected unless "so offensive, defamatory or opprobrious" as to remove it from the Act's protection, and allegedly defamatory statements remain protected unless made "with knowledge of its falsity, or with reckless disregard of whether it was true or false."[3]

Moreover, we agree with the Region that Gipson's conduct did not constitute sexual harassment. According to the "EEOC Guidelines on Discrimination Because of Sex," certain actions including "verbal or physical conduct of a sexual nature constitute sexual harassment when... (3) such conduct has the purpose or effect of unreasonably interfering with an individual's

work performance or creating an intimidating, hostile, or offensive working environment."[4] Additionally, determinations of allegedly unlawful sexual harassment are made on a case by case basis after an examination of "the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[5] Here, although Gipson has been confrontational and impolite at grievance meetings, there is no evidence that he made sexual overtures or comments. As noted above, the repetition of the allegedly offensive terms to which Burt-Green had objected are generally accepted by society as words or terms of respect rather than of a sexual nature. Finally, while Gipson may have treated Myers somewhat differently in grievance meetings, this difference clearly was not based on gender but rather on the fact that Myers was more responsive to resolving grievances that was Burt-Green. Under all the circumstances, there is insufficient evidence of sexual harassment that would privilege the Employer's refusal to deal further with Gipson, the Union's designated bargaining representative. Absent settlement, a Section 8(a)(5) complaint should issue.

B.J.K.

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[1] The Region found nothing to substantiate Burt-Green's claim that she thought the use of, or the tone with which Gipson used, "Madam" or "Ma'am" referred to her as the proprietor of a whore house, noting that Gipson is from the South and more likely uses them as terms of respect, consistent with their first two dictionary definitions.

[2] See KDEN Broadcasting Co., 225 NLRB 25, 35 (1976) (inclusion of individual on bargaining committee who had been loud, bitter and abusive when he was discharged and had threatened to sue employer was not "persuasive evidence" that his presence would be disruptive, create ill will, and make good-faith bargaining impossible); Caribe Staple Co., 313 NLRB 877, 889 (1994) (refusal to bargain not privileged where union bargaining committee included employee who had been discharged for assaulting supervisor not then involved in bargaining). Compare Fitzsimons Mfg. Co., 251 NLRB 375, 379 (1980) (union representative's unprovoked assault of employer official at beginning of grievance proceeding rendered "collective bargaining impossible or futile" and employer was "relieved of its duty to deal with that particular representative").

[3] KBO, Inc., 315 NLRB 570 (1994) (citations omitted). Accord: Postal Service, 241 NLRB 389, 390 (1979) (employer being offended by derogatory epithet does not render speech unprotected).

[4] 29 CFR Section 1604.11(a).

[5] 29 CFR Section 1604.11(b).